



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no.: JR2227/16

In the matter between:

MUSHUSHISI DANIEL MTIMKULU

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER ZAZI MQINGWANA N. O

Second Respondent

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Third Respondent

Heard: 11 July 2017

Delivered: 25 August 2017

JUDGMENT

Introduction

- [1] This is an application to review and set aside a condonation ruling issued by the second respondent on 20 June 2016.

- [2] In terms of that ruling, the second respondent found that the applicant, Mr MD Mthimkulu, had failed to show good cause for the late referral of his unfair dismissal dispute to the first respondent for conciliation. The second respondent dismissed the applicant's application for condonation and his unfair dismissal dispute.

Background and material facts

- [3] The applicant was employed by the third respondent in 1998, as a Trainee Technician. At the time, the applicant possessed only a matric qualification. This was communicated to the third respondent at the time of his employment, together with the fact that the applicant also had partially completed a Diploma in Engineering from the Vaal University of Technology.
- [4] From 2000 to 2008, the applicant occupied various positions at the third respondent. On the applicant's version, those positions were as a result of him being promoted through the ranks over a number of years based on his experience and capability.
- [5] In 2010, the applicant was appointed into the position of Executive Manager: Engineering Services. There is a dispute between the parties before this Court regarding whether the applicant's appointment to this position was following his application, or whether he was simply promoted into the position. This dispute is not material to the outcome of this application, and I do not consider it necessary to resolve it.
- [6] The third respondent alleges that the applicant submitted various qualifications at the time of his appointment to this position. These qualifications included a Diploma in Mechanical Engineering from the Vaal University of Technology in 1998; a Degree in Mechanical and Maintenance Engineering from the University of the Witwatersrand in 1999; and a Doctoral Degree in Engineering Management in 2010.

- [7] Shortly after his appointment to the position of Executive Manager: Engineering Services, the applicant's salary was substantially increased. First, on his appointment, he was paid an amount of R1 650 000.00 per annum. A little while later, the applicant's salary was increased to R2 800 000.00 per annum. On the third respondent's version, this increase to R2 800 000.00 was made on the basis of a fraudulent offer of employment that the applicant had provided to the third respondent from a German-based company, and the third respondent's decision, on the basis of that offer, to make a counter-offer to the applicant. The applicant denies this but states that the offer that precipitated the counter-offer from the third respondent was actually from a company called P-Tec Systems for the position of Engineering Specialist Consultant. He does not, however, dispute that the counter-offer was made and that his salary was increased to R2 800 000.00 per annum.
- [8] During the course of 2015, various media reports surfaced relating to the third respondent's purchase of locomotives from Spain. The specific details of these reports are not relevant to the determination of this application, save to note that it concerned allegations relating to a procurement process involving several hundred million rands.
- [9] Simultaneously with the publication of these reports, various questions concerning the applicant's status as an engineer and the authenticity of his qualifications also emerged. These included several media reports in which the academic credentials of the applicant were questioned.
- [10] Following the publication of these reports, the third respondent launched an investigation into the allegations against the applicant. On its version, it emerged from that investigation that the applicant was neither registered with the Engineering Council of South Africa, nor did he possess a Masters or Doctoral Degree.
- [11] It also emerged out of that process that the purported offer of employment from the German-based company to the applicant was fraudulent.

- [12] On 18 July 2015, the applicant sent an SMS to one of the third respondent's Directors. The SMS stated the following:

'Director I was really embarrassed did not even know what to say. I have nothing except a few Engineering subject from VUT. I am really ashamed, my experience and skills is the only thing that saw me through the ranks. I was embarrassed to say it. I am sorry for letting you down and all Directors. I thought I will send an SMS separate. Regards, Mtimkulu.'

- [13] The applicant admits to sending this SMS but denies that it reveals any wrongdoing on his part. He also provides no explanation as to why he would have felt ashamed or embarrassed by the allegations, that on his version were falsely made, that he provided fraudulent qualifications during the period of his employment.
- [14] Shortly thereafter, on 23 July 2015, the applicant handed the third respondent a letter of resignation. He informed the third respondent that his resignation was with immediate effect.
- [15] The third respondent did not accept the applicant's immediate resignation and informed him then that it intended to charge him with misconduct and convene a disciplinary hearing during his notice period.
- [16] The applicant alleges that he was then off sick until February 2016 and had no knowledge of the third respondent's intention to institute a disciplinary hearing against him. He says this in his replying affidavit in this Court, despite having admitted in his affidavit in support of his application for condonation in the CCMA that he was told at the time of his resignation, in July 2015, of the third respondent's intention to conduct a disciplinary hearing. The applicant also admitted to having sight of a media report in July 2015, which also made reference to the third respondent's intention to convene a disciplinary hearing.

- [17] The third respondent states that it convened the hearing and dismissed the applicant in August 2015, in absentia, and that it informed the applicant of his dismissal in August 2015 by e-mail, transmitted to his private e-mail address.
- [18] The applicant denies having received such e-mail and alleges that he first became aware of his dismissal in February 2016, when he reported for duty again at the third respondent. He says so despite not being remunerated since August 2015.

Evaluation

- [19] The second respondent's finding with regards to the date on which the applicant became aware of his dismissal was central to the determination of the degree of lateness and whether the applicant had provided a reasonable explanation of that delay.
- [20] The applicant alleges that the second respondent committed a number of gross irregularities in the conduct of the proceedings. All three of the applicant's listed grounds of review criticise the second respondent's finding regarding the date on which the applicant became aware of his dismissal, and his assessment of the evidence before him that was material to this finding.
- [21] The second respondent found on the evidence before him that the applicant was dismissed on 22 August 2015, and that it was improbable that he only became aware of his dismissal in February 2016. He made this finding having regard to the following evidence:
- 21.1) the applicant was informed in July 2015 when he handed in his resignation with immediate effect that the third respondent intended to hold the applicant to his notice period of one month;
- 21.2) the applicant was also informed at that time that the third respondent intended to convene a disciplinary hearing against him in respect of various allegations of misconduct within the period of his notice;

- 21.3) the applicant was in any event aware of a media report published in or about July 2015 relating to his resignation which made mention of the third respondent's decision to institute disciplinary proceedings against him;
- 21.4) the applicant's assertion that his private e-mail address, to which the third respondent transmitted the notice informing him of his dismissal, was linked to his work e-mail address and he, therefore, did not receive his dismissal letter, was improbable; and
- 21.5) the third respondent last remunerated the applicant in July 2015, and the applicant's failure to follow up with the third respondent from July 2015 to February 2016 regarding its failure to remunerate him was inconsistent with his allegation that he believed that he was still employed by the third respondent.
- [22] In light of his finding that the applicant was dismissed in August 2015, and that he was informed of his dismissal then too, the second respondent then found that the referral to conciliation in terms of section 191(1)(b)(i) of the Labour Relations Act¹ was accordingly 176 days late.
- [23] Given that the entire explanation provided by the applicant as to why the referral was made late revolved around his version that in fact he only became aware of his dismissal in February 2016, the second respondent then found that the applicant had failed to provide a reasonable explanation for the delay in referring his dispute to conciliation.
- [24] Despite this, and the dictum of the Labour Appeal Court in *National Union of Mineworkers v Council for Mineral Technology*² (to which the second respondent correctly referred to), the second respondent proceeded to consider the applicant's prospects of success and found also that the applicant had not demonstrated good prospects of success in the main claim.

¹ 66 of 1995 (LRA).

² (1999) 3 BLLR 209 (LAC).

[25] The second respondent concluded in those circumstances that the applicant had failed to show good cause why the late referral of his unfair dismissal dispute should be condoned.

[26] Section 190(1) of the LRA states that:

(1) The date of dismissal is the earlier of -

(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer.

[27] At best for the applicant, the date of his dismissal was 22 August 2017. The time period prescribed by section 191(1)(a)(i) within which he had to refer his unfair dismissal dispute to conciliation accordingly started running from that date, being also the date on which the third respondent made a final decision to dismiss.

[28] The only explanation provided by the applicant for the period between 22 August 2015 and 16 February 2016 was that he was unaware of his dismissal.

[29] Given the second respondent's finding on the probabilities that the applicant was aware of his dismissal in August 2015, there was then simply no reasonable explanation provided by the applicant as to why he referred the dispute late.

[30] Section 191(2) of the LRA permits the CCMA to condone the referral of an unfair dismissal dispute outside of the time period prescribed by section 191(1)(a)(i). In *Melane v Santam Insurance Co Ltd*,³ the Appellant Division set out the test for the determination of applications of this nature. In short, that test requires a balancing of various factors, including: the length of the delay; the explanation provided for the delay; the prospects of success; and the prejudice that the applicant will suffer if the applicant is not granted.

³ 1962 (4) SA 531 (A).

- [31] These are all issues that were properly considered by the second respondent in arriving at the conclusion that he did. I am not persuaded that he has committed any irregularities in the manner alleged by the applicant, or at all. It is indeed improbable that the applicant could not have known about his dismissal in August 2015 when he was not remunerated since then.
- [32] At the hearing of this application, counsel for the applicant submitted that he was also instructed that a further reason why the applicant could not enquire from the third respondent about why he had not been remunerated since July 2015 was that the conditions imposed upon him on his release on bail (the applicant was also charged criminally) prevented him from contacting the third respondent.
- [33] This issue was neither raised in the papers before this Court nor in the applicant's affidavit in support of his application for condonation in the CCMA. I am not inclined to consider it. However, even if I were to, I am in any event not persuaded that this in itself is a reason enough to explain a period of approximately six months.
- [34] Regarding costs, I am of the view that an order for costs is not warranted.

Order:

- [35] In the circumstances, I make the following order:
1. The application to review and set aside the condonation ruling of the second respondent issued under case number GAJB610909, is dismissed.
 2. There is no order as to costs.

Naidoo AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:

Advocate B.C Zulu

FOR THE FIRST RESPONDENT:

Mr N Mbuyisa of Maserumule
Incorporated Attorneys.